Office-Supreme Court, U.S.
FILED
APR 29 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~938~~ 64

NUNZIO PROVENZANO and SALVATORE BRIGUGLIO,

Petitioners,

against

HAROLD W. FOLLETTE, Warden, Green Haven Prison, Stormville, New York and DANIEL MCMANN, Warden, Clinton Prison, Dannemora, New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondents
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

BRENDA SOLOFF
Assistant Attorney General
of Counsel

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
a. Procedural History	3
b. Facts	4
ARGUMENT—None of petitioners' claims raises a substantial question requiring the Court of Appeals to issue a certificate of probable cause	8
1. The introduction at trial of the tapes of conversations between petitioners and the person recording the conversations did not violate petitioners' rights under the Four and Fourteenth Amendments to the Constitution	8
2. The evidentiary value of the tapes and transcripts does not raise an issue cognizable by way of habeas corpus	11
3. Petitioners' claim that they were entrapped is frivolous and raises no constitutional issue	12
Conclusion	14

CASES CITED

Berger v. United States, 388 U. S. 41 (1967)	10
Carafas v. La Vallee, 391 U. S. 234 (1968)	3
Desist v. United States, 394 U. S. 244 (1969)	11

PAGE

Dryden v. United States, 391 F. 2d 214 (5th Cir. 1968) 9

Katz v. United States, 389 U. S. 347 (1967) 10, 11

Linkletter v. Walker, 381 U. S. 618 (1965) 11

Lopez v. United States, 373 U. S. 427 (1963)..8, 9, 10, 11, 13

Masciale v. United States, 356 U. S. 396 (1958) 13

Osborn v. United States, 385 U. S. 323 (1963) 10, 11

People v. Provenzano, N.Y.L.J. March 19, 1968, p. 16, col. 4, *aff'd.* 30 A. D. 2d 1053 (1st Dept. 1968) ... 4

People v. Roper, Provenzano and Briguglio, 24 A. D. 2d 560 (1st Dept. 1965), *aff'd.* 17 N. Y. 2d 711 (1966), *cert. denied,* 385 U. S. 825 (1966) 3

Sherman v. United States, 356 U. S. 369 (1958) 12

Sorrells v. United States, 287 U. S. 439 (1932) 12, 13

Townsend v. Sain, 372 U. S. 293 (1963) 12

United States v. Alford, 373 F. 2d 508 (2d Cir.), *cert. denied* 387 U. S. 937 (1967) 12, 13

United States v. Jackson, 390 F. 2d 317 (2d Cir. 1968) 9

United States v. Jones, 292 F. Supp. 1001 (D.D.C. 1968) 11

United States v. Kaufer, 406 F. 2d 550 (2d Cir. 1969), *aff'd.* 394 U. S. 458 (1969) 9

United States v. White, 405 F. 2d 838 (7th Cir. 1969), *cert. granted* —— U. S. ——, 37 U.S.L. Week 3379 11

United States ex rel. Molinas v. Mancusi, 370 F. 2d 601 (2d Cir. 1967), *cert. denied* 386 U. S. 984 (1967) 9, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 938

NUNZIO PROVENZANO and SALVATORE BRIGUGLIO,

Petitioners,

against

HAROLD W. FOLLETTE, Warden, Green Haven Prison, Stormville, New York and DANIEL MCMANN, Warden, Clinton Prison, Dannemora, New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Opinions Below

The Court of Appeals wrote no opinion in denying the application for a certificate of probable cause. The order of denial, which is unreported, appears in the Appendix to the petition, p. 2a. The opinion of the District Court is unreported and is set forth in the Appendix to the petition, pp. 3a-12a.

Jurisdiction

The order of the Court of Appeals was entered on September 12, 1969. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Does federal habeas corpus lie to test a claim that a state conviction is invalid because at trial a recording of a conversation between petitioners and a third party was introduced, when the recording was made by the third party who also testified to the conversation at trial?

2. Assuming *arguendo* that the introduction of such a recording is held to violate due process of law, should such a new rule be announced retroactively by way of federal habeas corpus attacking a final state judgment of conviction?

3. Does federal habeas corpus lie to test the factual assertion that tapes of recorded conversations were so inaudible that their introduction at trial, together with transcripts thereof, denied petitioners a fair trial?

4. Does federal habeas corpus lie to test a claim that petitioners were entrapped especially where the record refutes the claim and where this Court has held that a claim of entrapment does not raise a constitutional issue?

Statement of the Case

a. Procedural History

Petitioners are two former state prisoners* who were charged by a New York County Grand Jury with the crimes of attempted grand larceny by false pretense in the first degree (former N. Y. Penal Law, §§ 2, 1290-a, 1294) and conspiracy to bribe a labor representative (former N. Y. Penal Law, § 380). After trial in the Supreme Court, New York County, they were convicted of the attempted grand larceny charge and sentenced, on March 5, 1963, to terms of from two to four years in prison. The judgments of conviction were affirmed by the Appellate Division (*People* v. *Roper, Provenzano and Briguglio,* 24 A. D. 2d 560 [1st Dept. 1965]), and by the New York Court of Appeals (17 N. Y. 2d 711 [1966]). Certiorari was denied by this Court. *Roper* v. *New York,* 385 U. S. 825 (1966).

Petitioners next sought habeas corpus in the United States District Court for the Southern District of New York alleging that their federally protected rights were violated in that:

1. The introduction against them at trial of recordings made on a Minifon device concealed on the person of one Hubert Braun violated their right to the exclusion of unreasonably seized evidence;

2. The tapes were incomplete and largely inaudible; and,

3. Petitioners were entrapped and the trial court improperly refused to submit the issue to the jury.

---

* Petitioners were in the custody of the respondent Wardens at time they filed their petitions for habeas corpus. Before the decision of the District Court they were conditionally released and have since been released outright. See *Carafas* v. *LaVallee,* 391 U. S. 234 (1968).

Only the second and third claims had been raised by petitioners on direct appeal from the judgments of conviction in the state courts and only the entrapment issue was raised in the petition for certiorari. All of the claims were subsequently raised by way of an application to the trial court for a writ of error coram nobis. The application was denied on March 17, 1968. *People* v. *Provenzano*, N.Y.L.J. March 19, 1968, p. 16, col. 4. The order was affirmed by the Appellate Division, First Department (30 A. D. 2d 1053) and leave to appeal to the Court of Appeals was denied.

By order dated June 18, 1969, the District Court denied the petition for habeas corpus and, on September 12, 1969, the Court of Appeals for the Second Circuit declined to issue a certificate of probable cause to appeal.

b. Facts

Petitioners are two of the original three defendants in this case, the third being one Eustace Roper. All three were union officials who entered into a scheme to obtain money from one Hubert Braun by representing to Braun that they could bribe another union official, Milton Silverman, to enter into an "easy" union contract with Braun's New York architectural metals firm.

On September 6, 1961, Braun telephoned Roper, who was a friend's friend and an official of Local 660 of the Teamsters in New Jersey. Braun told Roper that his firm was being struck by Local 810 of the Teamsters, that a considerable amount of violence and property damage was involved and he feared for his employees' safety. He asked Roper if there was "anything we can do?" (715).* Roper said he would see someone and perhaps it could be "straightened out" adding that "it may cost a couple

* Numbers in parentheses refer to pages in the printed Record on Appeal from the judgment of conviction.

of bucks . . . five hundred or a thousand or so'' for ''expenses'' and saying ''They're a pretty lousy bunch—inclined to play rough'' (715-16). Roper said that he would get in touch with Braun (716). About a week later, Braun received a message that Silverman had called and left a phone number. Braun did not return the call (717). It is obvious from this record that, contrary to petitioners' assertion (Pet. p. 3), it was not Braun who was proposing bribery, but Roper, an undertaking which clearly had no appeal for Braun who did not follow up the opportunity.

During the strike, Detective Bertram L. Scott of the New York City Police went to Braun's premises a number of times and observed incidents which he related to a Mr. Perrin of the office of the District Attorney of New York County (1351). At the request of Mr. Perrin, Braun went to the District Attorney's office (718-19, 1351-52). As a result of his conversation there, Braun tried to reach Roper and succeeded in doing so on November 30, 1961 (721-23). With Braun's permission, the conversation was recorded (724).

Roper told Braun that he had spoken to someone who wasn't interested but said he would try again. He told Braun to call someone at the NLRB ''and I'll work on this angle and you work on yours'' (724). After a series of calls back and forth between Roper and Braun, including one by Braun from, at Roper's suggestion, a public phone booth, Roper told Braun that he had met ''these people'' and, Roper being reluctant to go to Braun's place of business, a meeting was arranged at Paul's Bar at 34th Street and Eighth Avenue. All of the calls were recorded with Braun's permission (732-39).

For his meeting, Braun was, with his consent, equipped with a concealed recording device (743, 759-60). At the meeting, Roper told him that he would get a ''good con-

tract you can live with; the men that you want to get rid of, you name them and the day. He'll get rid of them. You take them back in the meantime" (749). Roper said that Miltie, meaning Silverman, would take care of it and said "[t]hey want important dough" meaning ten thousand dollars (749-50). He added that, in return for the money he (Roper) would see that everything went all right (753).

A second meeting, also recorded by Braun, was held at Roper's suggestion at one o'clock in the afternoon of December 8, 1961 at the Mermaid Room of the Park Sheraton Hotel (765-67). Roper arrived accompanied by the petitioners, Briguglio being introduced as "Sam" and Provenzano as "John" (768-69). This marked petitioners' first overt appearance in the case and they plunged right into the negotiations. When Roper told Braun he was dealing with Silverman, Provenzano told him he had nothing to worry about, that Silverman could be controlled and that the men who could control him had "gotten a hold of him" (769). When Braun said that he did not want the picketers back, which Roper interpreted as a request for guarantees, Briguglio said, "You can guarantee right from the start" (770). Provenzano assured Braun that if he took the men back he could get rid of one every couple of weeks "boom boom" (776-77). Responding to Braun's suggestion that if the money was to go to anyone from 810, that person should be at the table signing, Provenzano said, "You give the money to Ed [Roper] and he knows where it has to go" (780), adding "If you want your guarantees, you'll get them from Miltie himself" (782). He did not want payment by check and said the money was not for 810 but for the record book (792). Briguglio told Braun that he would get the kind of contract he could live with but it wouldn't be on paper (787). Provenzano and Briguglio promised that there would be no more violence (791) and a meeting was arranged by Provenzano with Silverman for five o'clock that same day (783).

When Braun returned to the Mermaid Room, again equipped with a recording device (801), Milton Silverman accompanied Roper and petitioners (800). After some discussion of terms Silverman left and Briguglio, who was angry with Braun for asking so many questions of Silverman, told him to give Roper his answer by five o'clock the following Monday. "Either it is yes or no. If it is no, we bow out of the picture" (803-13).

On Monday, December 11, 1961, Braun called Roper to tell him it was a deal and another appointment was set up at the Mermaid Room for noon the next day (816-17). The next morning, Braun brought $2,000 in twenty dollar bills in a travel brochure to the office of the District Attorney. The numbers of the bills were noted and Braun was equipped with a recording device (818-20). Present at the December 12 meeting were Braun, Roper, Silverman and petitioners (820-22). When, after more negotiations, Silverman started to leave, Braun said that he would like to get the matter settled and Silverman said that he would too because it had been very expensive. Braun said "If you mean the expenses, I have them here" and reached into his pocket (823). Immediately, everybody left the table leaving Braun alone. Roper returned to say he shouldn't have talked to Silverman about money. Silverman came back to say goodbye, told Braun that he was playing with dynamite and left with the two petitioners (824-25). Roper accepted the $2,000 after remarking that the rest was not there (826, 838). He said that petitioners did not want to be at the table when the money was passed (840). Roper was arrested on a pre-arranged signal (827).

Milton Silverman, President of Local 810 of the International Brotherhood of Teamsters testified that Provenzano, whom he had known for 15 years, called him in November, 1961 and expressed an interest in helping Local 810 settle the strike at Braun (258-59). A meeting was held, in late October or early November, with Silverman,

Roper, Provenzano and Briguglio (267). Silverman said he never received any indication that the three intended to bribe him (321-500).

A pre-trial motion to suppress evidence was denied (48-186). The introduction of the recordings and the money passed to Roper by Braun was objected to "on the grounds that it must be contradictory, even from the People's own witnesses, as to whether or not the defendants were actually placed under arrest before the search was made . . . that actually the defendant was not told that he was under arrest prior to the search and seizure which took place" (184-85).

The tapes of the telephone conversations with Roper and the tapes of the meetings and the transcripts prepared by Braun from the tapes, were admitted into evidence, over objection on non-constitutional grounds, after an extensive voir dire. The recordings were played for the jury (1168-1346).

ARGUMENT

None of petitioners' claims raises a substantial question requiring the Court of Appeals to issue a certificate of probable cause.

1. The introduction at trial of the tapes of conversations between petitioners and the person recording the conversations did not violate petitioners' rights under the Fourth and Fourteenth Amendments to the Constitution.

The claim that the introduction of the recordings made by Braun of his conversations with petitioners violated petitioners' right to be free from unreasonable searches and seizures was properly rejected by the Courts below. This case is squarely controlled by *Lopez* v. *United States,* 373 U. S. 427 (1963), involving a bribery charge arising under circumstances very similar to those in the instant case. Recordings were used there to corroborate the offer of a

bribe as to which the offeree could have testified in any event. This Court held that (*id.* at 439):

> "Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory. We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording."

In his concurring opinion, Chief Justice Warren, while expressing reservations as to the indiscriminate use of electronic devices, had no difficulty with their use as corroborative of otherwise admissible evidence. *Id.* at 442-45. *Lopez* is still the law. *United States* v. *Kaufer,* 406 F. 2d 550 (2d Cir. 1969), *aff'd* 394 U. S. 458 (1969); *United States* v. *Jackson,* 390 F. 2d 317 (2d Cir. 1968); *United States ex rel. Molinas* v. *Mancusi,* 370 F. 2d 601, 603 (2d Cir. 1967), *cert. denied* 386 U. S. 984 (1967); *Dryden* v. *United States,* 391 F. 2d 214 (5th Cir. 1968).

In their petition to this Court, petitioners attempt to distinguish *Lopez* on the ground that whereas in that case there was probable cause to use the device, in this case there allegedly was not. Petitioners take the District Court to task for failing to deal with this "important distinction" (Pet. p. 7). That Judge Wyatt did not mention the question of probable cause is scarcely surprising. In the first place, petitioners did not mention it. They did not mention it to Judge Wyatt and they did not mention it in the state courts. Their belated interjection of it here simply raises a spurious issue in the wrong forum.

Second, there is no basis in law for the argument. Probable cause is irrelevant since, as this Court held, *Lopez* "involves no eavesdropping whatever in any proper sense of that term." *Lopez* v. *United States, supra,* at 439. As long as Braun had a right to attend the conversations, as he obviously did, he had a right to record them. Contrast *Berger* v. *United States,* 388 U. S. 41 (1967) and *Katz* v. *United States,* 389 U. S. 347 (1967), involving surreptitious surveillance of *all* parties to the conversation which all believed would be private and as to which there was no other testimony. Since, under the circumstances of this case no Fourth Amendment right was involved, the question of probable cause never arises. Certainly *Lopez* never discussed the issue or in any way indicated its relevance.

Third, there is no basis in fact for the argument. Even Braun's recorded telephone conversations with Roper were made after there had been strong indication that a bribe was possible. And certainly by the time petitioners appeared on the scene there was probable cause to believe that a full-fledged scheme was underway.

The petitioners reiterate their contention below that the knowledge that the Agent in *Lopez* was a government employee distinguishes that case from this, a distinction properly rejected by the District Court. *United States ex rel. Molinas* v. *Marcusi, supra,* relying on *Osborn* v. *United States,* 385 U. S. 323 (1966). Moreover, any other result would be inappropriate. The fact that a "party" is in government employ should not be a distinguishing feature. Both Braun and the agent in *Osborn* were open in acknowledging their identity. Both were misleading in their willingness to participate in an illegal scheme. The defendants in *Osborn* had no more belief in the honesty of the agent with whom they dealt than did the petitioners here in the honesty of Braun. Both were wrong and petitioners here

have no more right to complain than the *Osborn* defendants. It should be noted, also, that the fact that there was a Court order in *Osborn* does not mean that it was constitutionally required, nor did this Court indicate that it was.

The cases relied on by petitioners as being inconsistent with this case do not help them. *United States* v. *Jones*, 292 F. Supp. 1001 (D.D.C. 1968), suppressing monitored evidence rests on an overbroad reading of *Katz* v. *United States, supra.* Moreover, it distinguishes *Lopez,* which is indistinguishable from this case, as standing "on its own special facts." 292 F. Supp. at 1010, no. 8. In *United States* v. *White,* 405 F. 2d 838 (7th Cir. 1969), *cert. granted,* —— U. S. ——, 37 U.S.L. Week 3379, the informer who was the conduit for transmission of the conversation did not testify and the Seventh Circuit held that *Katz* controlled.

Petitioners have abandoned their prior substantial reliance on *Katz* apparently because this Court has since held that case not to be retroactive. *Desist* v. *United States,* 394 U. S. 244 (1969). *Katz* bears no relation to this case, but even if it did its effective date would not encompass petitioners who were convicted in 1961 even before *Lopez* itself was decided. If *Katz* itself is to be held to have overruled *Lopez,* or if *Lopez* itself is directly overruled, such decision should not affect these final judgments of conviction. *Desist* v. *United States, supra; Linkletter* v. *Walker,* 381 U. S. 618 (1965).

2. The evidentiary value of the tapes and transcripts does not raise an issue cognizable by way of habeas corpus.

As the District Court correctly held, the attack on the audibility of the transcript does not raise a due process claim in the context of this case. That issue was fully explored at the trial and reviewed on appeal. Thus, the admission of the tapes after a hearing, the adequacy of

which is not challenged, was presumptively correct. 28 U.S.C. § 2254(d); *Townsend* v. *Sain,* 372 U. S. 293 (1963). In any event, the adequacy of the tapes was solely a matter of the state law of evidence, not reviewable here. Finally, petitioners conceded in the state courts that the playing of the recordings was not alone prejudicial, protesting rather the transcripts, the accuracy of which was questioned. But the jury had before them not only Braun's own testimony but that of the three defendants and Silverman, each stating what was said. In addition, there were in evidence drafts of the transcripts depicting earlier efforts to evolve them. Braun and an investigator testified as to how the final transcripts were developed and certified their correctness. The witnesses were cross-examined on these issues and the jury was instructed to give the distributed transcripts such weight only as they might see fit to give them. Under such circumstances, receipt of the transcripts were eminently fair, and petitioners' belated attempts to find in *Lopez* a constitutional requirement that the tapes be flawless in all respects is wholly untenable.

3. Petitioners' claim that they were entrapped is frivolous and raises no constitutional issue.

Finally, petitioners' claim that they were entrapped fails to present a claim cognizable by way of habeas corpus. First, as Judge Wyatt held, the defense of entrapment is not constitutionally required to be extended by a state. *Sherman* v. *United States,* 356 U. S. 369 (1958); *Sorrells* v. *United States,* 287 U. S. 435 (1932). Second, petitioners' basic contention at trial was one of innocence, a claim inconsistent with that of entrapment. The State is not required to permit inconsistent defenses. *Cf. United States* v. *Alford,* 373 F. 2d 508 (2d Cir.), *cert. denied* 387 U. S. 937 (1967).

Further, as the New York Court of Appeals noted: "The present case did not present an issue of fact requir-

ing submission to the jury." 17 N. Y. 2d 711. Braun's "importunity" (Pet. p. 9) consisted of one innocent telephone call to Roper who immediately seized the opportunity to say that money would be required and a subsequent call by Braun, after speaking to the District Attorney, after which Roper undertook an elaborate scheme involving several people unknown to Braun, including petitioners and assumed direction of the entire undertaking without further ado. In dealing with Roper, Braun was not even aware of petitioners' existence. They appeared on the scene one day and participated in the negotiations expressing no reluctance to come back and working hard to persuade Braun of the advantages of the deal. Indeed, they held a meeting with Roper and Silverman prior to their meeting with Braun and it was *Provenzano* who set up that meeting before he had any contact with Braun. How it can be said, in the face of this, that the State or any of its agents entrapped petitioners, surpasses credulity. Braun did not "manufacture" petitioners' crime. *Lopez* v. *United States, supra,* at 434. Petitioners and Roper were ready and willing, without persuasion to enter into the scheme. *United States* v. *Alford, supra.* The fact that a stratagem was employed, in that Braun was not really willing to be bilked, does not create entrapment where, as here, the initial suggestion was made by Roper, extensive negotiations were carried on in Braun's absence by Roper and petitioners and no evidence even of inducement exists with respect to Braun. See *Sorrells* v. *United States, supra; Masciale* v. *United States,* 356 U. S. 396 (1958).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York, March 16, 1970.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondents

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

BRENDA SOLOFF
Assistant Attorney General
of Counsel